IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION NO.946 OF 1981

THE HON'BLE MR. JUSTICE Y.B. BHATT

Appearance:

S.H. Sanjanwala, advocate for the petitioners.
Mrs. K.A. Mehta, advocate for the respondents.

1. Whether Reporters of Local Papers may be allowed to see the judgement?

2. To be referred to the Reporter or not?

3. Whether their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

CORAM: Y.B. BHATT J.
Date of Decision: 21-11-1995

JUDGEMENT

1. The present petitioners are the original defendant no.2, defendant no.1B and defendant no.1C, whereas the respondents nos.1 to 3 are the original plaintiffs-landlords, respondent nos.4 and 5 are the original defendant nos.1A and 3 respectively.

2. It is pertinent to note at this stage that defendant nos.1A to 1C have been brought on record of the trial court during the pendency of the suit as heirs of original defendant

no.1. It is also pertinent to note at this stage the relationship between the parties. The original first defendant was the wife of defendant no.2, who was divorced by the defendant no.2 some time prior to the filing of the suit. As aforesaid, the first defendant (the divorced wife of the second defendant) died during the pendency of the suit before the trial court.

3. The present revision is one under section 29(2) of the Bombay Rent Act.

4. Before proceeding with the contentions raised in the present revision, it must be kept in mind that the present revision is one under section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. In the context of the powers of the High Court exercisable in such revisions, the ratio laid down by the Supreme court in the case of Helper Girdharbhai (AIR 1987 SC 1782) is most relevant. In the said decision the Supreme Court has observed in substance that in exercising revisional power under section 29(2) the High Court must ensure that the principles of law have been correctly borne in mind by the lower court. Secondly, the facts have been properly appreciated and a decision arrived at taking all material and relevant facts in mind. In order to warrant interference, the decision must be such a decision which no reasonable man could have arrived at. Lastly, such a decision does not lead to a miscarriage of justice. But, in the guise of revision, substitution of one view where two views are possible and the Court of Small Causes has taken a particular view, is not permissible. If a possible view has been taken, the High Court would be exceeding its jurisdiction if it substitutes its own view in place of that of the courts below because it considers it to be a better view. The fact that the High Court would have taken a different view is wholly irrelevant.

4.1 It must also be noted that in the case before the Supreme Court, the findings of the trial court were reversed in appeal, and it was the appellate decision which was before the High Court. The High Court in the revision under section 29(2) reversed the finding. Thus, in the revision before the High Court, it was not a case of concurrent findings of fact.

5. Before going to the detailed consideration of the merits of the matter, it is also relevant to note certain facts which are either undisputed or are undisputable looking to the evidence on record. The first defendant being the wife of the second defendant, were once upon a time (prior to 1970) living as husband and wife in the property which was leased out by the then owner and landlord Ibrahimbhai Ismailbhai

Kaukawala. However, soon thereafter marital discord developed between the husband and wife to the extent where the the first defendant-wife left her husband-second defendant, left the suit premises and went to live at her maternal place at Cambay some time around 1970-71. On 18th July 1972 the first defendant-wife wrote a letter exh.68 to her then landlord viz. Ibrahimbhai Ismailbhai Kaukawala, whereby she requested him to take possession of the premises and to forward her residential goods to her maternal residence at Cambay. The significance of this letter will be discussed later on, as to whether it amounts to a surrender of tenancy or mere surrender of possession. Thereafter the then owner of the property Shri Ibrahimbhai Ismailbhai Kaukawala sold the property to the present landlords-plaintiffs on 21st September 1972. At about this time, the first defendant wife made an application under section 125 of the Criminal Procedure Code before a competent court and obtained an order of maintenance against the first-defendant-husband dated 30th October 1972 which is at Exh.63. After purchasing the property the plaintiffs gave the suit notice Exh.52 to the defendants, dated 13th January 1974 terminating their tenancy on the ground of arrears of rent and demanded thereby both the arrears of rent as also vacant possession. Since the defendants failed to comply with the suit notice, the plaintiffs filed the present suit for arrears of rent and possession of the premises on 29th April 1974. It may be noted at this stage that when the then owner of the property Ibrahimbhai Ismailbhai Kaukawala sold the property to the present plaintiffs, apparently he had not informed the purchasers-plaintiffs about the letter written by first defendant wife at Exh.68. The plaintiffs as the new landlords, therefore, apparently assumed that the first defendant had merely left the premises on account of the marital discord without any change in her status of a tenant. It was apparently for this reason that the plaintiffs sued both the first defendant-wife and second defendant-husband for possession.

6. The case of the plaintiffs was that the first defendant-wife was the tenant of the suit premises and the second defendant husband was merely residing in the suit property as the husband of the first defendant, and when the first defendant left the suit premises, she had unlawfully sub-let the suit premises to the second defendant. It was after the divorce given by the second defendant to the first defendant that the second defendant entered into a marriage with the third defendant. The third defendant was, therefore, living on the suit premises as the subsequent wife of the second defendant, the latter being an illegal sub-tenant. In substance, therefore, the plaintiffs sued the defendants on the ground of arrears of rent for more than six months (with effect from 1st October 1972) and for illegal subletting.

7. It is an admitted position that the defendants did not raise any dispute as to standard rent within 30 days of the receipt of the suit notice, and since there was no dispute that the rent is payable by the month or that there were arrears of rent for a period of six months or more, this was a case governed by section 12(3)(a) of the Bombay Rent act.

8. It is also pertinent to note that the first defendant wife died during the pendency of the suit, after she was served with the summons of the suit. By the time she died she had not filed any written statement. On the death of the first defendant, defendant nos.1A to 1C were brought on record as legal representatives of the deceased first defendant, and were represented by their father and guardian ad litem (the second defendant). It is also pertinent to note that although defendant nos.1A to 1C appeared in court through an advocate, they failed to file any written statement. The second defendant had filed his own written statement at exh.20, but this was on his own behalf.

9. The second defendant in his written statement, denying that the first defendant was the sole tenant of the suit premises, contended that he was a joint tenant with the first defendant. The second defendant also raised a dispute as to standard rent, and further denied that he was occupying the suit premises merely as husband of the first defendant tenant. He also denied illegal subletting in his favour by the first defendant-wife.

10. On these pleadings the trial court framed issues at Exh.25. On the basis of the evidence on record, the trial court held that it was the first defendant-wife alone who was the tenant of the suit premises, and that the second defendant husband was not a joint tenant as contended by him, but was merely residing with the first defendant-wife in the suit premises as her husband. The trial court further held that when the first defendant-wife went to reside at her maternal place at Cambay, she had unlawfully sub-let the premises to the second defendant. The trial court further held that the first defendant-tenant was in arrears of rent from 1st October 1972, and since no tender or payment of arrears of rent was made within one month of the suit notice by the first defendant, the first defendant was liable to be evicted on the ground of arrears of rent as well. The trial court, therefore, passed a decree for eviction against all the defendants under section 12(3)(a) of the said Act.

11. Being aggrieved by the decree of eviction, original defendant nos.2, 3, 1B and 1C filed an appeal under section 29(1) of the said act. It is pertinent to note that at the

stage of filing of the appeal defendant no.1A appears to have attained majority and by that time had taken up service at Bombay.

12. It is also pertinent to note that during the pendency of the appeal the appellants therein amended their written statement, whereby the second defendant contended that the trial court had no jurisdiction to entertain and decide the suit. It was further contended that on the death of the first defendant, the second defendant was entitled to hold possession of the suit premises as guardian of the minor children.

13. Thus, the points considered in appeal were as to whether the first defendant was the sole tenant of the suit premises, whether the first defendant had illegally sub-let the suit premises to the second defendant and as to whether the trial court had erred in passing a decree for eviction against the first defendant on the ground of non payment of rent.

14. The crux of the present matter is the contention between the defendants as to who is the tenant of the premises in question. In other words, was it the first defendant-wife who was the sole tenant or whether it was the tenancy jointly in favour of the first and second defendants? On a total consideration of the evidence on record, the appellate court agreed with the trial court and held that it was the first defendant who was the sole tenant of the suit premises. The appellate court has extensively discussed the relevant evidence and material on record and in my opinion, has come to the correct conclusion on this basis. I do not propose to re-discuss the entire evidence on this point, but shall only summarise the same by noting the highlights.

15. The oral evidence of the second defendant at exh.90 is vague and is not corroborated by any reliable documentary evidence. Both the courts have found that the evidence of the plaintiff no.1 in this regard is not only reliable, but he is unshaken in cross-examination. Moreover, the oral evidence of the plaintiff is fully corroborated by the former owner and landlord of the property in question, viz. Ibrahimbhai Ismailbhai Kaukawala at Exh.67. Moreover, this aspect of the matter does not rest merely on oral evidence of the plaintiff and the former owner and landlord of the property. The rent receipts are on record at Exhs.81 to 83, and they all are issued in favour of the first defendant-wife. These receipts pertain to the year 1964-65, which is long prior to the date of the dispute. Furthermore, the receipt at Exh.83 pertains to the year 1971 which is also prior to the suit. Moreover, the rent note (Exh.61), though described as a licence

agreement, also corroborates the assertion of the plaintiffs that she was the sole tenant. What is equally material is that the rent receipts were issued in the name of the first defendant-wife and this was within the knowledge of the second defendant. The latter has admitted in his oral evidence that the receipts were issued in the name of his wife, that he knew about the same and he accepted the same without protest.

16. The trial court as also the lower appellate court has refused to draw any inference in favour of the second defendant, on the basis of certain documentary evidence sought to be relied upon by the latter. In my opinion, both the courts have rightly refused to draw such an inference or to rely upon such evidence to substantiate the contention of the second defendant in this regard. Exh.91 to 94 are ration cards of the year 1968 wherein the name of the second defendant husband is shown as the head of the family, which is only normal and natural. This does not establish tenancy in favor of the second defendant defendant. Exh.95 is a post-card received by the second defendant, at the address of the suit premises. This only means that he was residing there, but does not establish tenancy in his favour. Similarly, other documents such as extract of birth register, electoral roll, etc. only establish that the second defendant was occupying the premises, but do not establish that he was a joint tenant. In the premises aforesaid, I have no hesitation in upholding the finding of the courts below that it was the first defendant who was the sole tenant of the property in question.

17. On the question of illegal subletting on the part of the first defendant in favour of the second defendant, no doubt, the lower appellate court has made a few passing observations that the contention of the appellants in appeal on this finding are without any substance. However, the lower appellate court has not specifically dealt with the question of illegal subletting by the first defendant in favour of the second defendant. Be that as it may, and even if it be assumed that such a finding of the trial court cannot be upheld, it would not affect the ultimate outcome of the matter, since the decree passed by the trial court and confirmed in appeal can be supported and sustained on other grounds.

18. It may also be noted at this stage that the trial court has passed the decree against the defendants on the ground of arrears of rent, under section 12(3)(a) of the said Act.

19. There cannot be any dispute that the case would be

governed by section 12(3)(a) of the said Act since (1) there is no dispute that the rent is payable by the month, (2) no dispute of standard rent has been raised within 30 days of receipt of the suit notice by the defendants and (3) there is no dispute that arrears were in respect of a period exceeding six months. Under the circumstances, if the tenant fails to make payment of such arrears within one month after the receipt of the suit notice, the court is bound to pass a decree for eviction, and the court has no discretion under the specified circumstances.

20. It may also be noted here that the second defendant has sought to take the case out of the province of section 12(3)(a) by averring that he had tendered payment of arrears to the landlords, but the same was refused, and therefore section 12(3)(a) would not apply. This plea has rightly been negatived by the trial court by holding that such tender was by the second defendant in his own capacity, and as of right as a tenant or co-tenant and therefore such tender was not on behalf of the first defendant-wife, who was the sole tenant of the property. The landlords were, therefore, justified in refusing such tender made by an outsider. It may also be noted that the question of arrears of rent and the consequential decree passed under section 12(3)(a) of the said Act does not appear to have been argued in appeal although a ground in this regard has been taken in the memo of the appeal. It appears that this ground was not taken up in appeal, in view of an alternative plea raised as to the transmission of tenancy on the demise of the first defendant-tenant, on the assumption that if such a contention is upheld, the question of a decree passed on the ground of arrears of rent would not arise.

21. This takes me to the only substantial point argued in the present revision and that is the question of transmission of tenancy or succession to the tenancy of the first defendant.

22. Before dealing with this question in abstract, it is pertinent to note as to which of the parties has sought to raise this question, and which of the parties would be entitled in law to raise such a question.

23. It is pertinent to reiterate that the first defendantwife had left the suit premises, around 1970 or 1971, and there is unimpeachable evidence in this regard. The evidence on record further establishes, and particularly Exh.68, that the first defendant wife had addressed this letter to her then landlord (Ibrahimbhai Ismailbhai Kaukawala) "to take possession of the suit premises and to forward her goods to her residence at Cambay". The courts below have not

fully recognised the effect of, or acted upon this piece of evidence. Having carefully perused the said letter, and having given careful regard to the circumstances then prevailing at the relevant point of time, and having regard to the lack of cordial relations between the husband and wife at that point of time (which was either just prior to or just following the divorce), I have no doubt that the intention of the first defendant wife was to surrender the premises to the then landlord. The question whether the same would amount to a surrender of tenancy or a mere surrender of possession is, under the circumstances, merely academic. What matters is that the first defendant tenant was no longer interested in protecting or preserving her possession of the suit property. It must also be kept in mind that this was long prior to the suit, and that the first defendant expired during the pendency of the suit. Thus, when the first defendant-tenant expired, admittedly she was not in possession of the suit property, nor was she residing in the suit property. At the same time, it must also be kept in mind that the present plaintiffs, as recent purchasers of the property and as recent landlords, were not informed by the previous owner Ibrahimbhai Ismailbhai Kaukawala as regards this letter at Exh.68. It was, therefore, but natural that the plaintiffs' sued the defendants as if the tenancy in favour of the first defendant was subsisting. This act on the part of the present plaintiffs would not in any manner, revive the tenancy nor create a fresh tenancy, in case Exh.68 is construed as being a surrender of tenancy. In any case, even if Exh.68 is construed not as a surrender of tenancy, but merely as a surrender of possession, the suit notice has effectively terminated the tenancy, even if the same was in law subsisting at the relevant point of time.

24. It may also be borne in mind that the decree, based on arrears of rent of more than six months, is passed on the basis of a cause of action which had accrued in favour of the landlords prior to the date of the suit. The decree when passed would relate back to the date of the suit and would thus be binding on the heirs and legal representatives of the first defendant. Thus, the effective date would be the date of the suit, on which date the first defendant was alive. In other words, the decree has operative effect when the tenant was alive and it is, therefore, obvious that the question of succession to the tenancy would not arise on the date of the suit. In other words, the question of transmission and/or succession to the tenancy depends intrinsically on the date when the succession actually opens.

25. Even if it is assumed for the sake of argument that the question of succession to the tenancy would open during the pendency of the suit, the next question which must be

considered is as to who are the parties who would be entitled to raise the question of succession. Obviously, the second defendant-husband has no right to succession for the simple reason that he claims to be a joint tenant, which claim has been rightly negatived by both the courts below. It was never his case that he was living on the suit premises merely as a husband of the first defendant-tenant and therefore he would be entitled to succeed to the tenancy. There cannot be any dispute on the legal proposition that a co-tenant may claim to become the sole tenant on the death of the other co-tenant, but a surviving co-tenant can never claim to succeed to the tenancy through the deceased co-tenant. There is yet another aspect of the matter. The question of succession to the tenancy is specifically governed by section 5(11)(c)(i) of the said Act. The said provision reads as under:

> "5(11)(c)(i) - in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant as may be decided in default of agreement by the Court, and".

In order to claim succession to the tenancy, the person making such claim (1) must be a member of the tenant's family, and (2) must be residing with the tenant at the time of, or within 3 months immediately preceding the death of the tenant. Obviously, on the facts as found from the evidence on record, the second defendant-husband was not a member of the family of the first defendant (on the date of death of the first defendant), since he had long ago divorced her. Secondly, the first defendant had left the second defendant and had also left the suit premises about three years before the suit, and they were no longer residing together as husband and wife, and therefore, there was no question of the second defendant residing with the tenant at the time of tenant's death. Obviously, therefore, the second defendant has no right to succeed to the tenancy.

26. It was, however, sought to be urged by the present petitioners that at least the heirs and legal representatives of the first defendant-wife could put forward a claim to succession to the tenancy. It may be noted here that when the first defendant expired during the suit, three persons were brought on record as heirs and legal representatives viz. defendant nos.1A to 1C. Defendant no.1A was already a major even when he was brought on record; whereas defendant nos.1B and 1C were shown to be minors. However, defendant nos.1B and 1C were represented by the first defendant as father and guardian ad litem, and their address and place of residence was that of the second defendant viz. the suit premises, and

not that of the maternal residence and/or actual residence of the first defendant.

27. Thus, the question of succession to the tenancy so far as the children of the first and second defendant are concerned, there is another aspect to the matter. As already noted hereinabove, defendant Nos.1A to 1C were brought on record of the trial court as heirs of the first defendant, and though they appeared through an advocate, they failed to file any written statement. Thus, no contention was taken by them either by way of written statement or even by way of a submission, that they were entitled to succeed to the tenancy of the first defendant.

28. The second defendant however, contended in the present revision that he is entitled to raise this plea on their behalf as their father and guardian ad litem. In my opinion, this is not a pure question of law such as a question of jurisdiction or limitation, which can be raised at any stage of the proceedings. This plea is being raised for the first time in revision and therefore, requires to be turned down on the ground that the same cannot be raised since it is a mixed question of law and fact. Even assuming for the sake of argument that the second defendant can be permitted to raise the plea for the first time in the present revision, what is the ultimate outcome of such a plea? As seen from a plain reading of section 5(11)(c)(i) of the said Act, the tenancy can be transmitted only in favour of those who comply with the essential conditions contemplated in the said provision. Now, on the facts of the case, there is not an iota of evidence that the defendant nos.1A to 1C "were residing with the tenant at the time of, or within three months immediately preceding the death of the tenant". Thus, the claim of defendant nos.1A to 1C, even if it were to be considered academically, would fail on the facts of the case for want of evidence.

29. There is yet another aspect of this matter. Even assuming for the sake of argument, that defendant nos.1A to 1C were possibly residing with the first defendant at the time of the latter's death, it cannot be overlooked that the first defendant tenant at the time of her death was certainly not residing in the leased premises. Thus, when admittedly the first defendant was not in possession of the suit premises, and possibly had surrendered the tenancy to the then landlord, the question of succession to the tenancy in favour of the defendant nos.1A to 1C must necessarily be answered in the negative.

30. There is yet another facet to the matter which is indirectly connected with the question of succession to the tenancy. Even assuming for the sake of argument that the

defendant nos.1A to 1C would otherwise be entitled to succeed to the tenancy, they must also suffer the decree for eviction inasmuch as the decree has been passed on the ground of arrears of rent of more than six months under section 12(3)(a) of the said Act. Even if we assume that the question of succession to the tenancy could be opened in their favour during the pendency of the suit, and even assuming that under such circumstances section 12(3)(a) of the said Act would have no application to the facts of the present case, the court would then be bound to pass a decree for eviction under section 12(3)(b) of the said Act, inasmuch as the successor to the tenancy have failed to deposit the arrears of rent on the first date of hearing and have also failed to deposit the rent regularly in the trial court as also in the lower appellate court. It is by now well settled law that the tenant, in order to seek the benefit and protection of section 12(3)(b) of the said Act, must comply with the requirements thereof strictly, and the court has no discretionary jurisdiction in the matter. Thus, when the evidence on record fails to disclose that the would be successors to the tenancy have in fact made such payment or deposit, and have continued to do so regularly, a decree for eviction must necessarily follow.

31. No other point is urged in the present revision.

32. In the premises aforesaid, the decree for eviction passed by the trial court and confirmed in appeal is required to be sustained and the present revision is required to be rejected. Rule is, therefore, discharged with no order as to costs. Interim relief vacated.

33. At this stage learned counsel for the petitioners prays that some reasonable time be granted to the petitioners to vacate the premises. Accordingly the petitioners are granted time upto 29th February 1996 to vacate the premises, subject to the condition that they file an undertaking in this court on usual terms on or before 13th December 1995, and also pay up the arrears of rent, mesne profits and costs due till date on or before 13th December 1995..

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